

UNITED STATES COURT OF APPEALS May 28, 2008

FOR THE TENTH CIRCUIT Elisabeth A. Shumaker  
Clerk of Court

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In re:

CHARLES RUSSELL STEELE,

No. 08-7046

Movant.

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ORDER

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Before **KELLY**, **EBEL**, and **GORSUCH**, Circuit Judges.

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Movant Charles Russell Steele, a federal prisoner, has filed a motion for authorization to file a second or successive 28 U.S.C. § 2255 motion seeking to challenge his conviction for possession of a firearm during the commission of a drug trafficking crime in violation of 18 U.S.C. § 924(c). Steele argues that his claim relies on a “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.”

28 U.S.C. § 2255(h)(2). We conclude that Steele has not made a prima facie showing that the law he relies upon is “new.” He has thus failed to satisfy the requirements for authorization, and we therefore deny the motion.

Steele entered an unconditional guilty plea in 2001 to the § 924(c) firearms charge and to various other federal drug violations. He was sentenced to a term of imprisonment of 156 months. This court affirmed the judgment of conviction

and sentence on direct appeal, holding that Steele's voluntary and unconditional guilty plea waived all of his nonjurisdictional defenses. *United States v. Steele*, 29 F. App'x 501, 502-03 (10th Cir. 2002). In 2004, Steele's first § 2255 petition was denied by the district court. Steele did not appeal from that denial.

To obtain permission to file a second or successive § 2255 motion, Steele must show that his claim relies on (1) "newly discovered evidence," 28 U.S.C. § 2255(h)(1), a claim Steele does not make, or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," *id.* § 2255(h)(2). In his motion for leave to file a second or successive § 2255 petition, Steele argues that the Supreme Court decisions in *Bailey v. United States*, 516 U.S. 137 (1995), and *Bousley v. United States*, 523 U.S. 614 (1998), constitute the "new rule of constitutional law" sufficient to justify consideration of his second § 2255 petition. This contention is without merit.

To justify consideration of a second or successive § 2255 motion, the rule of law relied upon must, among other things, have been "previously unavailable" to the movant. 28 U.S.C. § 2255(h)(2). Here, both *Bailey* and *Bousley* had already been decided before Steele filed his first § 2255 motion. Neither case is a "new rule of constitutional law" for purposes of a second or successive § 2255 motion. *See Brown v. Warden, Springfield Med. Ctr. for Fed. Prisoners*, 315 F.3d 1268, 1270 n.2 (10th Cir. 2003).

Steele's argument that he received ineffective assistance of counsel is similarly insufficient to justify consideration of a second or successive § 2255 petition. Any ineffectiveness argument could have been raised in the first § 2255 proceeding. The argument is not based on either newly discovered evidence or a new rule of constitutional law and thus cannot be the basis for allowing a second § 2255 petition.

Accordingly, the motion for authorization is DENIED and the matter is DISMISSED. This denial of authorization is not appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari. *See* 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, appearing to read "Elisabeth A. Shumaker", followed by a horizontal line.

ELISABETH A. SHUMAKER, Clerk